(25)

No. 03-633

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,

Petitioner,

vs.

CHRISTOPHER SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the
Missouri Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Missouri Supreme Court's decision in ***State of Missouri ex rel. Christopher Simmons v. Donald Roper***, 112 S.W.3d 397 (Mo. banc 2003), which bans the execution of juveniles in the State of Missouri and effects no one other than Christopher Simmons, present the compelling reasons required to trigger this Court's certiorari review?

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OPINIONS BELOW

Petitioner Donald Roper seeks this Court's certiorari review of the Missouri Supreme Court's decision in ***State of Missouri ex rel. Christopher Simmons v. Donald Roper***, 112 S.W.3d 397 (Mo. banc 2003).

BASIS FOR JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. §1257(a). The Missouri Supreme Court's decision was announced on August 26, 2003. Petitioner filed a timely petition for certiorari review with this Court on October 24, 2003.

STATUTORY PROVISIONS AND RULES INVOLVED

This case involves the Missouri Statute defining murder in the first degree:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Mo. Rev. Stat. §565.020 (1994).

This case also involves the Missouri Supreme Court rule allowing for a petition for writ of habeas corpus:

> Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.

Missouri Supreme Court Rule 91.01(b).

STATEMENT OF THE CASE

On September 9, 1993, the body of Shirley Crook was found in the Meramec River in St. Louis County. On September 10, 1993, 17-year-old Christopher Simmons[1] was arrested at his high school for the crime. His trial on the charge of first degree murder began on June 13, 1994. The jury returned a verdict of guilty and the penalty phase to determine punishment took place on June 17, 1994. The jury returned a sentence of death, finding the following aggravating circumstances to support such sentence: (1) murder for money, (2) murder to prevent lawful arrest, and (3) depravity of mind. The trial court sentenced Chris Simmons to death on August 19, 1994.

Mr. Simmons sought postconviction relief in the Missouri Supreme Court following his conviction and sentence. The appeal began with Mr. Simmons filing his pro se Motion to Vacate, Set Aside, or Correct the Judgment or Sentence with the trial court on January 17, 1995. Appointed counsel filed a first amended motion and request for an evidentiary hearing on March 24, 1995. An evidentiary hearing was held on the motion on August 18, October 6, 23-24, and November 1, 1995. The motion did not raise the issue of Chris Simmons' juvenile status at the time of his death sentence. That motion was denied by the trial court on January 3, 1996.

Mr. Simmons then sought direct appeal relief from the Missouri Supreme Court by filing a notice of appeal on February 7, 1996. The Missouri Supreme Court denied the appeal and affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). The court denied a motion for rehearing on May 27, 1997. Chris Simmons then petitioned this Court for certiorari on July 2, 1997. The

[1] Christopher Simmons was born on April 26, 1976.

Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997). This appeal did not challenge the constitutionally of the juvenile death sentence.

Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. That petition, and two motions for reconsideration, was finally denied on September 28, 1999. Mr. Simmons appealed the denial of his petition to the Eighth Circuit Court of Appeals. That court denied relief in ***Simmons v. Bowersox***, 235 F.3d 1124 (8th Cir. 2001). Mr. Simmons sought certiorari review from this Court. The Court denied the petition for certiorari on October 1, 2001. The habeas corpus proceedings in federal court did not raise the issue of the constitutionality of executing a 17-year-old offender.

The Missouri Supreme Court set an execution date of May 1, 2002, and then reset the date for June 5, 2002. On May 3, 2002, Mr. Simmons filed a petition for writ of habeas corpus with the Missouri Supreme Court, alleging for the first time that his death sentence was illegal because he was a juvenile at the time of his crime. On May 28, 2002, the Missouri Supreme Court stayed Mr. Simmons' execution pending this Court's decision in ***Atkins v. Virginia***. Following that decision, the Missouri Supreme Court ordered that the parties file suggestions as to how ***Atkins*** applied to Mr. Simmons' case. On November 26, 2002, the Missouri Supreme Court issued a Writ of Habeas Corpus, and ordered briefing on the issue. Following briefing and oral argument, the Missouri Supreme Court issued its opinion prohibiting the execution of juveniles in Missouri. Petitioner seeks this Court's certiorari review of that opinion.

ARGUMENT

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons. . . . A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (emphasis added) The Missouri Supreme Court's opinion is simply the application of the federal legal rule on the issue of what constitutes cruel and unusual punishment, as interpreted and applied by this Court in ***Stanford v. Kentucky***, 492 U.S. 361 (1989), and ***Atkins v. Virginia***, 536 U.S. 304 (2002). The opinion creates no conflict with this Court's precedent. Furthermore, while the Missouri Supreme Court's decision in Mr. Simmons' case is without question an important decision for Mr. Simmons, the decision has little impact on federal law, or even on other Missourians, and therefore presents no compelling reason for this Court's discretionary review. For these reasons, the Court should not now exercise its discretion and grant certiorari on this issue.

The Missouri Supreme Court's Decision is a Proper Application of this Court's Legal Rule for Evaluating Evolving Standards of Decency

Petitioner complains that the Missouri Supreme Court's decision is "diametrically opposed" to this Court's holding in ***Stanford***, and not supported by the holding in ***Atkins***. (Petition, p. 10) Petitioner seeks certiorari review to correct the Missouri court's error in ignoring this Court's precedent and applying its own "subjective" standards of decency. This is a mischaracterization of the Missouri court's opinion. The Missouri court's opinion in no way modified the Eighth Amendment legal rule established in ***Stanford*** and applied again in ***Atkins***. Instead, it merely applied this Court's rule and, under the facts before it, reached a result different from the factual determination in ***Stanford***. ***Simmons***

v. Roper, 112 S.W.3d 397, 406-07 (2003). Such action in no way interferes with this Court's prerogative to set federal constitutional standards and, thus, does not provide a basis for certiorari review.

The fact that the Missouri court acted properly in undertaking the task of applying the facts before it to this Court's established Eighth Amendment rule is evidenced by other decisions in which the lower courts have performed the same task. In ***State ex rel. Holmes v. Honorable Court of Appeals for the Third District***, 885 S.W.2d 389 (Tex. Crim. App. 1994), the court applied this Court's rule in ***Herrera v. Collins***, 506 U.S. 390 (1993). In ***Herrera***, this Court considered whether newly discovered evidence of actual innocence entitled petitioner to federal habeas relief under the Due Process Clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishment in the Eighth Amendment. The Court answered "no," concluding that "[n]o matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez." ***Id.*** at 417, 419, 421. (O'Connor, J., joined by Kennedy, J., concurring)

Relying on the majority of the ***Herrera*** Court's view that the execution of a person who could prove his innocence would violate the Constitution, the ***Holmes***' court held that the defendant claiming actual innocence should be given an opportunity to demonstrate that, based upon the newly discovered evidence, "it is probable that the verdict would be different." ***Holmes***, at 398. The Texas court has since used this Eighth Amendment standard that was enunciated in ***Herrera***, and applied in ***Holmes***, to grant

relief where the facts compelled such result. *See* ***Ex parte Elizondo***, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996).

Likewise, in ***Oregon v. Kennedy***, 456 U.S. 667 (1982), this Court announced the rule that the double jeopardy clause barred the retrial of a criminal defendant whose conviction was secured by prosecutorial misconduct that goaded the defendant into seeking a mistrial. Relying on the ***Kennedy*** Court's logic, the court in ***State v. Colton***, 663 A.2d 339 (Conn. 1995), concluded that the double jeopardy clause similarly prohibited retrial under the facts of that case. In ***Colton***, the prosecutorial misconduct had not resulted in a mistrial, but the court held that the ***Kennedy*** rule nonetheless barred retrial. The court reasoned:

> We can see no principled justification for a distinction between prosecutorial misconduct that is clandestine, and therefore not discoverable until after a verdict or an appeal, and prosecutorial misconduct that is visible, and so can be remedied by a motion for mistrial or on direct appeal.

Colton, at 347. This Court denied certiorari in ***Colton***, 516 U.S. 1140 (1996). Certainly, if this Court had felt that the ***Colton*** court's actions in applying ***Kennedy*** to the facts before it somehow interfered with the Court's right to determine federal law, certiorari

would have been granted to quash this unauthorized exercise of power.[2]

The Missouri Supreme Court's decision is immediately distinguishable from those cases in which this Court has granted certiorari review to correct overbroad interpretation of the federal constitution by state courts. *See* ***Arkansas v. Sullivan***, 532 U.S. 769 (2001); ***Oregon v. Hass***, 420 U.S. 714 (1975). Indeed, it is instructive that petitioner has omitted to cite these cases, because they so clearly set the limits of novel state court interpretation of the federal constitution, and also are so clearly inapplicable to the Missouri Supreme Court's action in ***Simmons***.

In ***Arkansas v. Sullivan***, this Court held that, while "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards, [it] may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." ***Sullivan***, 532 U.S. at 772 (quoting ***Hass***, *supra*, 420 U.S. at 719). This Court thereby rejected the Arkansas Supreme Court's conclusion to the contrary, that "there is nothing that prevents [a state high court] from interpreting the U.S.

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[2] A look at ***Oregon v. Kennedy***, reveals that this Court granted review in that case because it found that the Oregon Supreme Court had taken an "overly expansive view of the double jeopardy clause." ***Kennedy***, 456 U.S. at 668-69 (1982). That overly expansive view, in brief, was that retrial should be barred under the Double Jeopardy Clause of the Fifth Amendment if a defendant successfully seeks a mistrial based upon prosecutorial "overreaching." Essentially, this Court held that "overreaching" was not enough. For a double jeopardy bar to be appropriate, a reviewing court would have to find that the prosecutor intentionally misbehaved in order to cause the defense to seek the mistrial. ***Colton*** took this standard and applied it to covert misconduct. This Court seems to have concluded that, whereas the Oregon court's decision was "overly expansive," the Connecticut court's decision was not. The difference would be, it appears, that the Oregon court tried to set a **legal standard** that was less exacting for the defendant than this Court though it should be. The Connecticut court, on the other hand, merely applied the legal standard in ***Oregon v. Kennedy*** to a new factual scenario. The Missouri court did the same thing in ***Simmons***.

Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." ***State v. Sullivan***, 16 S.W.3d 551, 552 (Ark. 2000).

The Arkansas Supreme Court — significantly unlike the Missouri Supreme Court in ***Simmons*** — transgressed this Court's federal constitutional prerogative by issuing a ruling contrary to this Court's well-defined legal standards when it held that a police officer's subjective motivation was relevant to determining the reasonableness of an arrest and search. This Court described the Arkansas decision as diametrically opposed to its legal standards that (1) subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis and that (2) a traffic-violation arrest will not be rendered invalid by the fact that it was a mere pretext for a narcotics search. ***Sullivan***, 532 U.S. at 772 (citing and quoting ***Whren v. United States***, 517 U.S. 806, 812-13 (1996), and ***United States v. Robinson***, 414 U.S. 218 (1973)).

The Missouri Supreme Court, by way of stark contrast, faithfully applied the legal standards of ***Stanford*** and ***Atkins*** to hold that the evolved standards of decency as of 2003, when considered in light of ***Stanford*** and ***Atkins***, properly support Eighth Amendment relief. The court made no claim to be *"more broadly" interpreting the United States Constitution* than this Court. Its decision objectively does not *impose greater restrictions as a matter of federal constitutional law*. The court does not hold on its own, for example, that certain objective indicia of evolving standards are to be deemed more relevant than they were in ***Stanford***. The Court, instead, firmly bases its legal standards (where they may vary in emphasis from ***Stanford***) on this Court's opinion in ***Atkins***. ***Simmons***, 112 S.W.3d at 408 (noting ***Atkins'*** emphasis on "consistency of

change"); 411 (relevance of the opinion of social, professional, and religious groups);[3] and 412 (relevance of independent examination of the social purposes intended by the death penalty).[4]

The Missouri Supreme Court acted in the same manner as the courts in ***Holmes*** and ***Colton***. The court applied the Eighth Amendment legal rule stated in ***Stanford*** and again in ***Atkins*** to the facts before the court. The court took care to follow the application of the rule in the exact way of the ***Atkins'*** Court, following the ***Atkins'*** Court logic step by step and citing to the exact language of the ***Atkins'*** Court in enunciating the legal rule. In ***Stanford***, the Court concluded that under the facts presented to it, the Eighth Amendment was not violated. Using the same test, the ***Atkins'*** Court concluded that under those facts, the Eighth Amendment was violated. The ***Simmons'*** court likewise concluded, using the same test, that the Eighth Amendment was violated. There is nothing extraordinary about this result.

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[3] The Missouri Supreme Court applied Stanford in ***Atkins*** as follows:

> While ***Stanford*** found the opposition of social, professional, and religious groups to be of little importance, the Court's more recent decision in ***Atkins*** clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded. ***Atkins***, 536 U.S. at 316 n.21. Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles.

Simmons, 112 S.W.3d at 411.

[4] The ***Simmons'*** Court notes that ***Stanford*** found examination of the social purposes irrelevant, but it adopts the arguments made in ***Thompson*** and ***Eddings*** in light of ***Atkins'*** clear acceptance of their relevance. ***Simmons***, 112 S.W.3d at 411-12 & n.19.

Christopher Simmons is the Only Person Affected by the Missouri Court's Decision

At the time of the Missouri Supreme Court's decision, there were two juveniles on Missouri's death row, Christopher Simmons and Antonio Richardson. Because Mr. Richardson was sentenced to death by a judge rather than a jury, his sentence was commuted to life based on this Court's decision in ***Ring v. Arizona***. Now, of the 56 men on Missouri's death row, none of them were under the age of eighteen at the time of the commission of their crimes. Furthermore, counsel's research has uncovered no cases anywhere in the State of Missouri in which the state was seeking the death penalty against a juvenile at the time of the court's decision in Mr. Simmons' case. Due to the extremely limited impact of the Missouri Supreme Court's decision -- petitioner's protestations to the contrary -- it cannot be said that this issue is of great importance to the State of Missouri.

Petitioner implores this Court to grant certiorari by asserting that the issue is important due to the number of juveniles sent into the adult criminal court and the number of those juveniles who were charged with murder. (Petition, p. 16) Petitioner ignores the relevant statistics, which go to the heart of the issue here, as to how often the juvenile death penalty is used. Those statistics tell a different story. In recent years the number of youths under the age of eighteen that have been sentenced to death in the United States has sharply declined, as the following chart indicates:[5]

[5] The source of the chart is Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - December 15, 2003*, Table 4, page 9. The report is available online at http://www.law.onu.edu/faculty/streib/JuvDeathDec15,2003.pdf.

Year	Number of Juvenile Death Sentences
1993	7
1994	17
1995	13
1996	12
1997	8
1998	11
1999	14
2000	7
2001	7
2002	4
2003	2

Likewise, the number of juveniles actually executed in this country is nearing extinction. In 2003, only one juvenile was executed.[6] Since 1993, only 18 juveniles have been executed out of approximately 674 executions carried out in this period.[7] The imposition

[6] Scott Hain was executed on April 3, 2003 in Oklahoma. *See* Streib, *The Juvenile Death Penalty Today*, Tables 1 and 2, pp. 4-5.

[7] *Ibid.*, at Table 2, p. 5.

and actual use of the juvenile death penalty affects relatively no one.[8] Therefore, this Court's extraordinary review is not compelled in Mr. Simmons' case.

Petitioner also seeks review on the basis that the Missouri Supreme Court's decision eliminates the "clear constitutional rule" enunciated in this Court's decision in ***Stanford v. Kentucky***, 492 U.S. 361 (1989). (Petition, p. 16) Petitioner exaggerates the power of the Missouri court's decision. The decision in Mr. Simmons' case affects *only* Missouri (and in fact, as discussed above, *only* Chris Simmons). Obviously, the Missouri Supreme Court cannot, and does not pretend to, change the federal law as determined by this Court. Certiorari review is not warranted.

CONCLUSION

WHEREFORE, respondent Christopher Simmons respectfully requests that this Court enter its Order denying the petition for writ of certiorari in this case.

[8] The exception to this statement is the State of Texas, where TWENTY-EIGHT juveniles currently sit on death row -- three with execution dates in 2004 following Fifth Circuit review (Edward Capetillo [March 30], Efrain Perez [June 23], and Raul Villareal [June 24]. *See* Streib, *supra*, Appendix B. These juveniles may well have an argument that the issue is one of public importance rather than chiefly of importance to the parties, because of Texas' almost unique willingness to actually execute juvenile offenders. This Court will have the opportunity to consider granting certiorari review on the Eighth Amendment issue in petitions that currently have been filed on behalf of Anzel Jones (another Texas juvenile currently without an execution date; No. 03-7779 on this Court's docket) and Brian Capetillo (no docket number available yet). Raul Villareal has filed a motion for leave to file an out-of-time certiorari petition which also raises the Eighth Amendment issue (No. 03M37, to be conferenced January 9th). To the best of the undersigned's knowledge, the petition of Efrain Perez, presently pending conference (No. 03-7156 on this Court's docket), does not present the Eighth Amendment issue.

RESPECTFULLY SUBMITTED,

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